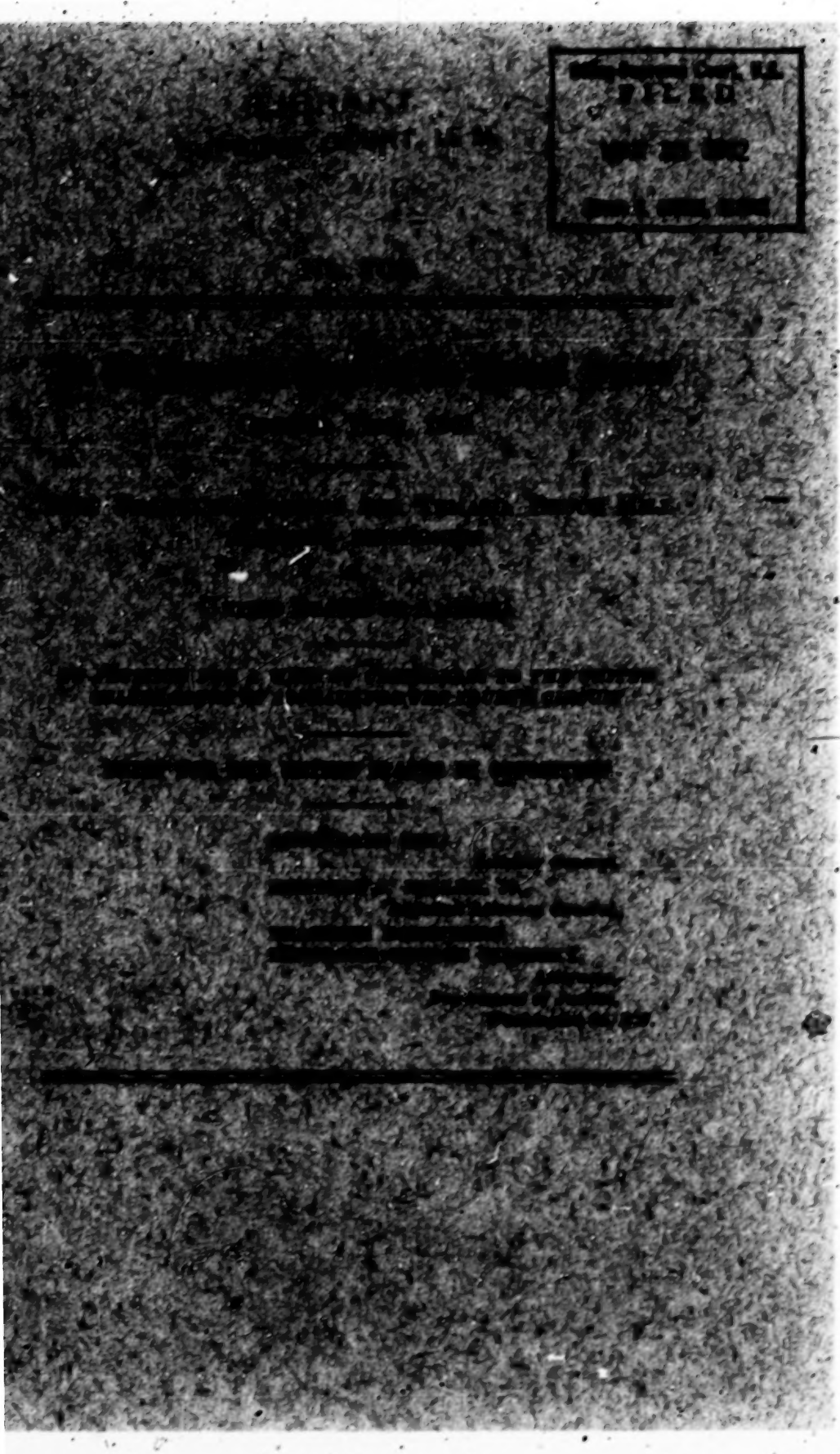

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 703

BERT FRANKLIN MOORING AND TEMASIA BRUCE HILL MOORING, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 60–75; Pet. App. 14–26) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1962. The petition for a writ of certiorari was filed on February 5, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether evidence as to items used in running a house of prostitution, which were observed and seized

during a search incident to arrest for violation of the Mann Act, was properly admitted.

STATEMENT

Petitioners and Joseph L. Boyette were convicted by a jury in the United States District Court for the Eastern District of North Carolina on charges growing out of the interstate transportation of Bonnie Jo Carter for purposes of prostitution. Counts 1 and 4 of the indictment charged a conspiracy under 18 U.S.C. 371 and a substantive offense under 18 U.S.C. 2421 (R. 3–9, 12). Petitioner Bert Franklin Mooring received concurrent sentences of three years' imprisonment (R. 10). Petitioner Temasia Bruce Hill Mooring was sentenced to concurrent prison terms of thirty months (R. 11). The court of appeals affirmed the conviction, Chief Judge Sobeloff dissenting on the ground that the items seized in a search incident to arrest were not instrumentalities of the crime.

1. *The crime.*—Boyette, who wanted Mrs. Carter to work as a prostitute to support him, introduced her to petitioners on August 2, 1959, in Kinston, North Carolina. Petitioners, who ran a place called the "24 Hour Truck Stop" in Virginia, explained to Mrs. Carter how they operated (R. 31–32). The next week Boyette transported Mrs. Carter to Virginia (R. 35).

Petitioners explained to Mrs. Carter how she was to make "dates", that she could use one room downstairs or either of two rooms upstairs, and that she was to keep a record of the number of dates and the money on a *pad (of restaurant guest checks)* in the kitchen drawer (R. 39–40, 14). Mrs. Carter worked as

a prostitute from Thursday night until the following Tuesday when she became ill. During that period she collected from $260 to $300 in "dates," and Boyette took her share at the end of each day (R. 39–42). Mrs. Carter testified that she had gone to Virginia because Boyette had threatened her and that she was afraid (R. 16).

2. *The search and seizure.*—On August 28, 1959, at 1:30 in the afternoon, agents of the Federal Bureau of Investigation arrested petitioners at the 24 Hour Truck Stop, after obtaining a warrant for their arrest on the charge of interstate transportation of Bonnie Jo Carter for purposes of prostitution (R. 1–2, 17, 43, 46). Mr. Mooring was arrested in the lunch room, on the first floor, and Mrs. Mooring, in her room on the second floor. The agents made a search of the premises (R. 46). In a drawer in the kitchen they found an order book upon which had been recorded a number of "5's", an envelope with a five dollar bill, and 5½ dozen prophylactics (R. 47). Two other guest checks with figures written on them were found in a waste basket in one of the second floor rooms (R. 49, 50). The guest checks were introduced into evidence. The agent testified to the contents of the rooms, including the discovery of five douche bags in the showers (R. 47–48). The defendants objected to anything discovered as a result of the search and moved to strike the introduction of the three guest checks on the ground that they were immaterial and not *connected to the defendants* (R. 17, 50). These motions were denied (R. 20, 50).

ARGUMENT

Petitioners attack the admissibility of evidence as to what the agents observed (*i.e.*, the douche bags and the prophylactics) and as to what they seized (*i.e.*, the guest checks) as incident to the arrest. The court below divided on the issue whether the three guest checks were proper subjects of seizure in this particular case (see Pet. App. 19–20, 22–26). There was no disagreement (see Pet. App. 17–18, 22) that the search was lawful as incident to an arrest made with a valid warrant (see *Harris* v. *United States*, 331 U.S. 145; *Agnello* v. *United States*, 269 U.S. 20, 30) and that the search was sufficiently confined in scope and not a mere wanton seizure of the wholesale contents of the establishment (cf. *Kremen* v. *United States*, 353 U.S. 346).

The majority of the court below recognized (Pet. App. 18–19) that every article discovered in the course of a search is not subject to seizure and that this Court, in determining the reasonableness of a search and seizure, has frequently drawn a distinction between contraband, fruits of crime or instrumentalities for its accomplishment, and purely evidentiary materials. In fact, the dissent specifically noted that the majority acknowledged "the correct rule of law," but failed to apply it (Pet. App. 22). There is, therefore, no disagreement on the general legal principles as established by this Court, but a difference of view in applying the accepted general principles to the unique facts of this particular case. As this Court noted in *Go-Bart Co.* v. *United States*, 282 U.S. 344, 357: "There is no formula for the

determination of reasonableness. Each case is to be decided on its own facts and circumstances"—and in this case there is no need to review the determination below that in the particular circumstances here the challenged items could properly be seized.

The guest-check records were of the same kind as those fully described and explained by the complaining witness, whose testimony cannot be challenged (see R. 14, 39–40), and the actual slips were therefore not the direct, nor even significant, evidence of the crimes. The offenses charged consisted of a conspiracy and a substantive offense of transporting a woman in interstate commerce for the purpose of having her engage in the practice of prostitution. The three guest checks, as well as the douche bags and prophylactics—the evidence as to which petitioners also challenge—were obviously a part of the paraphernalia of the illegal commercial establishment which was the object of the transportation (see *Wilson* v. *United States*, 232 U.S. 569), and, as such, they were "things connected with the crime" (see *Agnello* v. *United States*, 269 U.S. 20, 30).

Contrary to the suggestion of the dissenting judge below (Pet. App. 24–25), instrumentalities of a crime include more than items which may be used in the commission of a further, additional crime. Even though a spent bullet is an instrumentality by which a crime may have been committed, the bullet is useless for the commission of additional crimes in the future. Moreover, even if the view expressed in the dissenting opinion were correct, the seizure could be considered

proper in the present case, because, so long as a commercial house of prostitution continues to be a going establishment, it remains a potential encouragement for the interstate transportation of women and therefore a means of further crime.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1962.

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[1] The seized items were not of a self-incriminatory nature (see *Boyd* v. *United States*, 116 U.S. 616) and, in themselves, suggested no harm to petitioners which may explain petitioners' failure to have moved to suppress the items prior to trial. Petitioners invoked the discretionary action of the trial judge to entertain a motion to suppress during trial, under Rule 41(e), F.R. Crim. P.